



OFFICE OF INSPECTOR GENERAL

RICHARD THOMAS
Mayor

CHARLES KNAPP
Inspector General

March 14, 2019

Hon. Richard Thomas

Hon. Andre Wallace

Hon. Deborah Reynolds

2019 MAR 14 P 3:44
MOUNT VERNON, NY

Pursuant to the authority vested in this Office by sec. 69-b of the City Charter, please find enclosed a Preliminary Report with the results of, and recommendations arising from, an inquiry into whether the Board of Ethics is in compliance with the City Charter and New York law. A final report shall issue upon the receipt and evaluation of additional evidence and your comments. If none are received, then this Preliminary Report shall be deemed the Final Report on the matter.

The Preliminary Report delivered herewith is confidential. As you know, the Charter provides that it may be made public by action of the Mayor's Office, the City Council or the Comptroller's Office, whether acting independently, severally or jointly.

Respectfully submitted,

OFFICE OF THE INSPECTOR GENERAL FOR THE CITY OF MOUNT VERNON

PRELIMINARY REPORT

The purpose of this Report is to examine whether the Mount Vernon Board of Ethics ("Board of Ethics" or "Board") is in compliance with the provisions of the City Charter and of the applicable provisions of New York General Municipal Law.

CONCLUSIONS

The Board of Ethics as currently constituted violates state law. The fatal flaw arises from Section 24-7A of the City Charter which establishes the Board's membership. That provision, barring membership to any City officer or employee, is in direct conflict with Section 808(3) of New York General Municipal Law ("GML") that requires at least one such person as a member. This is an instance where compliance with the City Charter is defiance of the State Law. As a result, not only is the current Board of Ethics improperly constituted and therefore an illegal entity but so was each and every prior Board that adhered to the Charter mandate.

While it will be for the courts to deal with the consequences, some conclusions are self-evident. An unlawfully constituted Board can have no legitimate power or authority to do or demand anything of anyone. It follows that each and every act and action taken by an illegal board is of no legal force and effect, and that all decisions or determinations made by such a board are *void ab initio*. Any evidence an illegal Board provided to another governmental agency would be tainted as the fruit of a poisonous tree.

RECOMMENDATIONS

1. The current Board of Ethics must be disbanded immediately.
2. All of the Board of Ethics' documents, books and records of any kind (including but not limited to all minutes, notes, correspondence, rules, regulations, policies, procedures, advisory opinions disclosure statements, ethics complaints) must be surrendered immediately to the custody of the City Clerk for safekeeping and upon a written request made available to the Inspector General for inspection and copying.
3. All current litigation undertaken by or on behalf of the Board must be immediately discontinued with prejudice.
4. The City is ultimately responsible for and should bear the expenses and costs associated with all actions taken by the Board, as they are by their nature illegal. Therefore, the City should
 - a. recoup any attorney's fees, costs and expenses it has paid to support the Board in litigation or in its general course of business,
 - b. reimburse the reasonable attorney's fees, costs and expenses incurred by parties in all matters involving the Board, including but not limited to litigation, proceedings or responding to inquiries from the Board,

5. All fines of any type imposed by the Board but not yet paid shall be immediately rescinded.
6. All fines of any type imposed by the Board that have been paid shall be immediately remitted to the payor.
7. The current members of the Board shall be liable to the City for the immediate reimbursement or return of all City funds the Board received during their tenure.
8. Section 24-7A shall be made consistent with GML 808(3).
9. Other provisions of Section 24-7 should be reviewed and amended as deemed necessary and appropriate. This Office suggests the following amendments be considered:
 - a. The City Council should no longer have the sole right to appoint members to the Board. Instead, the City Council, the Mayor and the Comptroller shall each appoint one person to the Board of Ethics and shall agree on two members who are City officers or employees.
 - b. The Board of Ethics shall report its findings exclusively to the Corporation Counsel who shall in appropriate circumstances take whatever action may, in his professional judgment, be consistent with advancing the policies set forth in Section 24-1.
 - c. The Board of Ethics shall expressly be made subject to the jurisdiction of the Office of the Inspector General.
 - d. The scope of the Board's powers and authorities shall be defined so as to avoid any conflict or overlap with the Inspector General's powers and duties set out in Section 69-b and shall expressly deprive the Board of any authority to investigate where there is an open criminal investigation or prosecution.
 - e. A clear definition of "unethical standards, practices or conduct" shall be formulated as a Charter amendment, so as to rein in an otherwise boundless jurisdiction.
 - f. Rules protecting the procedural rights of any target of the Board's investigation, consistent with federal and state constitutional and statutory provisions, shall be set out in the Charter, and
 - g. A provision confirming that the Corporation Counsel is the legal advisor for all matters before the Board of Ethics, and that where there is a good faith disagreement over whether the Corporation Counsel must recuse or disqualify himself with respect to a specific matter, such recusal or disqualification shall be required only upon a finding by an independent third party that such action is necessary under the circumstances.
10. Once Section 24-7 is appropriately updated, it shall be put to a public referendum to replace the current Section 24-7.
11. Any rules and regulations drafted by a future Board must first be reviewed and approved by the Corporation Counsel and, after they are then adopted by the Board, posted on the City's website and in any other place deemed suitable and appropriate by the City Council.

Factual Background

The Inspector General's inquiry

In a January 28, 2019 addressed to Mayor Richard Thomas, the Board of Ethics, acting through its Secretary Gregory Cannata, made a written demand for information regarding an ongoing arson investigation. The Board asked for the identity of the person "who is leading the investigation into the fire" and of "which files were damaged and whether or not back-up copies exist." On January 30, 2019,

Corporation Counsel, citing Section 24-7E¹, advised the Board that it had no jurisdiction over the matter and directed the Board to "immediately cease all inquiries of this nature."

On February 4, 2019, the Board of Ethics responded in a letter from its Chair Nicole Lucio. She rejected Corporation Counsel's authority to order the Board to cease its inquiry, arguing that it "does not answer to you" but "[w]e answer to the City Council." The Board rejected Corporation Counsel's advice "as it lacks any statutory basis and is further suspect ethically" though the basis for that suspicion was left unexplained. The Board, citing the same Charter section cited by Corporation Counsel, declared that it "is empowered and authorized 'upon complaint ... or on its own initiative, to investigate allegations of unethical practices.'" The Board further asserted that "[a]ll City employees and agencies, including the Mayor, Buildings Commissioner, Fire Commissioner, Police Commissioner and even the Corporation Counsel must furnish to the Board of Ethics such data, information and statements" citing section 24-7F.

Given the potential consequences flowing from such a broad inquiry, this Office sent the Board a letter to confirm, among other things, whether it was in compliance with the Charter's rule-making requirements. In particular, the letter sought documents and information relating to whether the Board had drafted and, where required, had promulgated to the public, its rules and regulations. Additionally, inquiry was made to discover if the Board had a definition of "unethical practices", absent which its jurisdiction was potentially boundless so as to justify, in this instance, interfering in an ongoing criminal investigation and penalizing City employees who refused to cooperate.

The Board declined to provide any of the requested documents or information. In its written reply, the Board argued that this Office had no jurisdiction over it and was acting "at the Mayor's behest." While not stated explicitly, the implication was that rather than obtain the Board's rules and regulations through discovery in the lawsuit the Board of Ethics brought against the Mayor to compel him to pay a fine it had unilaterally imposed, he instead directed this Office to get those documents. Aside from being factually incorrect, the logic of the assertion is not apparent.

In what can only be viewed as an attempt at intimidation, the Board then "urge[d]" the Inspector General "to read Charter section 24-5 (E)² and ask yourself if you are violating this provision." The Board gave no factual basis its suggestion nor did it ever provide one when requested. That is no surprise as its assertion has no factual basis.

This Office sent its reply on February 24, 2019 but the stalemate continued.

The sudden appearance of State auditors and their equally sudden disappearance

On February 28, 2019, this Office was advised that auditors from the State Comptroller's Office had requested an entrance conference for Monday, March 4 to commence an audit of the Board of Ethics and seek certain information from the City Comptroller. On Monday, two state auditors presented themselves at the conference and explained that Comptroller Thomas DiNapoli had decided to make a

¹ In relevant part, Section 24-7E authorizes the Board to "investigate allegations of unethical practices in violation of this article or any statute, rule or regulation relating to conflicts of interest, ethical conduct and interest of municipal officers and employees in contracts...."

² Section 24-5 provides "As standards of conduct, it is deemed advisable that no City officer or employee should: ... E. Make any personal investments in enterprises which he has reason to believe may be directly involved in decisions or rulings to be made by him or which will otherwise create substantial conflict between his duty in the public interest and his private interest."

priority of ethical governance. Twenty municipalities were chosen, with Mount Vernon to represent Westchester County. The Mayor and other City officials provided the auditors with the information and documents they requested, along with a dedicated office, keys and ID cards to facilitate their 24 hour access to City Hall. They anticipated their work would take two to three weeks. In fact, they left precipitously on Thursday morning, March 7, explaining that the Mount Vernon audit was indefinitely postponed.

The available evidence points to a political intervention as the cause of the audit's abrupt termination. The directive to shut down the audit came hours after the auditors had reached out to the Secretary of the Board of Ethics who accused them of having been sent by the Mayor and, for good measure, objected to the scope of their inquiry. The Board member then spoke to the auditors' supervisor. It appears that other officials were then contacted leading to the closing down of the audit operation in Mount Vernon. The other nineteen audits of other ethics boards in New York State are ongoing.

When this Office called the auditors' supervisor, it was directed to his supervisor who similarly refused to answer any questions and instead advised that all inquiries be direct to the Comptroller's press office. Because of the inherent seriousness of this matter, this Office notified in writing the Counsel to the State Comptroller (who continues to oversee investigations), asking that the auditors return to complete their task and that he investigate this inappropriate intervention. That communication has been ignored.

The continuation of the Inspector General's probe

On March 8, 2019, the Board sent this Office another letter, this time from Vice Chair John Caruso, reiterating the Board's denial of this Office's jurisdiction but appending a document purporting to be its rules and regulations and a redacted set of the purported minutes. The letter concluded with a request that this Office open inquiries into a list of matters that read like the talking points of a certain Council member who wishes to be the next Mayor.³

The rules and regulations are undated but extrinsic evidence suggests that they were completed at some point around April 2018. Prior to then, the Board had no written rules, regulations, policies or manuals. In any event, there is nothing to indicate that the Board's 2018 rules were ever made public in any manner calculated to provide appropriate notice to the general public.

The attached minutes of the April 2, 2018 meeting were unintentionally revealing, highlighting the lack of concern with such niceties as due process even when it came to one of its own members. On April 2, 2018, the Board passed an amendment granting itself the power to remove one of its members and then immediately applied it, without any notice or hearing, to remove a Board member for conduct that occurred before the provision was approved.

The minutes are silent on whether the Corporation Counsel's advice had been solicited with respect to both the amendment and the removal vote. In fact, the Corporation Counsel was entirely uninvolved. Whether the amendment itself is consistent with the Charter is an open question as to which legal advice should have been sought. The Charter grants exclusively to the City Council the power to appoint

³ Had the Board of Estimate and Contract abided by Sec. 69 of the Charter and fixed an annual salary for the Inspector General and had the City Council and Comptroller budgeted adequate funding to allow for hiring staff, this Office would have entertained such an inquiry. However, it has proven impossible to find anyone beyond the Inspector General himself willing to work on a *pro bono* basis.

the members of the Board. Implicitly, then, only the City Council would have the power to remove a member. It is far from clear that the Board could determine its own composition.

At earlier meetings, certain Board members expressed unease that Cannata wanted to have the Mayor turn over financial documents even though he had not even a suspicion of wrongdoing.⁴ Concern was also expressed for Cannata's breaking the confidentiality of an inquiry by speaking directly with City employees in connection with repairs to a sidewalk in front of the Mayor's residence. A general concern revolved around Cannata's seemingly unique focus on the Mayor for reasons no one could fathom.

Another disturbing incident came to light during this Office's inquiry. In an April 20, 2018 letter, the Board was advised that once its March 19, 2018 Report was, at its own recommendation, made public, it no longer had any authority to continue its inquiry. What followed next appears to have been the Board's response to this legal argument. It sought unprecedented coercive powers from the City Council that not even this Office possesses. A resolution was drafted based on the Board's September 26, 2018 letter requesting that the Board be given subpoena powers for people and things, the unilateral power to declare a person subject to one of its subpoenas in contempt and the unilateral power to impose monetary penalties up to \$10,000. Not content with its extra-judicial coercive powers, the Board also sought to authorize the Comptroller to "deduct said civil penalty from that person's pay at a rate of fifty (50%) percent of that person's gross pay each pay period until the penalty is fully paid."

Three things are striking about this raw grab at power. First is the complete lack of any procedures to safeguard due process rights, a defect perhaps anticipated by the Board's April removal of one of its members. Second, it is inconceivable that any attorney reviewed this resolution prior to its submission to the City Council as it plainly violates New York's labor laws. Eventually some unidentified person did notice, crossed out the phrase "a rate of fifty (50%) percent" and handwrote "the maximum amount allowed by state law." Third, while one penalty provision applied to persons "employed by the City of Mount Vernon", the very next provision authorized the Board to fine and sue persons "not employed by the City of Mount Vernon." This provision runs counter to the express limitation on the Board's authority as set out in the Charter. Section 24-7B clearly provides that the "Board of Ethics shall act **only with respect** to officers, employees and agency members of the City of Mount Vernon" (emphasis added). This was not the first instance in which the Board sought to impose itself on non-City employees, apparently it did not take that lesson to heart. Although the City Council passed this amendment on November 14, 2018, it failed to override the Mayor's veto at its November 28 meeting due to Councilperson Copeland's objection and Councilperson Duarte's abstention.

⁴ This concern over a fishing expedition was turned on its head and a fishing expedition was enshrined in the rules. The Validation and Verification Process set out in Art VI, sec. 9 established a process for the "representative sampling of all individuals of all grades and offices who have filed a Financial Disclosure statement" without actually explaining what made that "representative sampling" a truly random exercise. Nevertheless, the unfortunate selectees would be required to provide an open-ended laundry list of documents "**including but not limited to** statements from third-parties such as banks and brokerages, as well as mortgage statements, articles of incorporation, certificates of title, loan agreements, tax returns, credit card statements **and so on**" (emphasis added). Failure to comply "may amount to misconduct and will be recommended (*sic*) to the City Council and/or the appropriate prosecutor." Again, there is no objective standard against which to measure a person's compliance nor any brake on the Board's power to continue asking for information without end. The rule's combination of vagueness, intrusiveness and arbitrariness, triggered by nothing in particular, is a textbook example of over-reach.

The question left hanging from this episode is who was to be the target for the Board's enhanced coercive powers and who would benefit from them. One possible clue was inadvertently supplied by Chair Lucio when she informed the Corporation Council that the "[we] answer to the City Council."

- Recently, the public has witnessed the City Council President and the Comptroller working together to create a budget and then override the Mayor's veto. And, in light of evidence suggesting the Board's relentless pursuit of the Mayor and its failure to address the legal argument advanced by the Mayor's attorney, it is plausible to conclude that the Board was being weaponized to open another front in the political battle with the Mayor.

Charter Analysis:

The Charter provision establishing Board membership is in direct conflict with State Law. Section 24-7A establishes the Board of Ethics and sets out who its members are or, more precisely, who cannot be members. Specifically the Charter requires that the "members of such Board **shall not** otherwise be officers and employees of the City" (emphasis added). This provision was passed in 1977. Yet, in 1970 New York General Municipal Law 808(3) required that a board of ethics established by "any municipality other than a county ... **shall include at least** one member who is an elected or appointed municipal officer or employee" (emphasis added).

How the Charter provision was thought to comply with State law is unclear. However, the consequences are as clear as they are inescapable: the current Mount Vernon Board of Ethics, not one of whose members is an "elected or appointed municipal officer or employee" (as has been confirmed by Human Resources), violates State law. The same can be said of every prior Board as well. Simply put, by complying with the City Charter member requirement, the Board necessarily violated State law.

While it will be for the courts to decide the issue, an argument can be made that nothing any Mount Vernon Board of Ethics has ever done, directed or decided has any legal force or effect and are *void ab initio*. Indeed, any evidence uncovered by the Board and shared with any other governmental agency is tainted as fruit of the poisonous tree and would be liable to suppression. In this exceptional case, the error of law is so blatant that to sustain a claim of good faith reliance would have that exception swallow the constitutional safeguards of due process and related constitutional and statutory protections.

A secondary defect involves Section 24-7C's requirement that the Board "upon its formation shall promulgate its rules and regulations as to its forms and procedures and maintain proper records of its opinions and proceedings." Promulgation, by definition, requires some form of notice to the public. While the Board provided this Office with what purported to be its rules and regulations, it provided no evidence of their promulgation or when they were adopted. There is no evidence of promulgation at any time and significant evidence that nothing was completed within the timeframe specified in the Charter.

Even if these rules were timely promulgated, their substance would raise all manner of legal issues. For instance, Article V, sec. 5 describes the entirety of the hearing procedures, "At the discretion of the Chair, the complainant may be given an opportunity to appear before the Board. The subject of the investigation will be given an opportunity to appear before the Board unless a majority plus one of the members vote against said appearance." Section 7 imposes a further limitation when it mandates that "[a]ll hearing and discussions under Article V are confidential and shall be conducted in Executive

Session." These provisions would find a comfortable home in the Star Chamber of Tudor England or the Spanish Inquisition of the Middle Ages; they are utterly inconsistent with accepted 21st Century conceptions of due process and other fundamental constitutional rights.

Article II, sec. 7⁵, covering the "Removal from the Board of Ethics", a power that may not even belong to the Board but to the City Council, does not provide the target with any notice, is vague as to what might constitute a basis for removal, fails to set forth any standard of review against which to judge the conduct and does not allow for the member to speak in his defense.

Any Board that adopts rules that evince such a cavalier disregard of fundamental constitutional rights has disqualified itself from serving the people of Mount Vernon. One might be tempted to conclude that the greatest violator of ethical conduct in Mount Vernon is its own Board of Ethics.

Because of the fatal deficiencies this Report has uncovered, the current Board of Ethics must be disbanded immediately, all of its documents secured by the City Clerk and appropriate steps taken to correct the relevant Charter provision and make any and all other changes to section 24-7 that may be deemed necessary and prudent.

Dated: March 14, 2019

A handwritten signature in black ink, appearing to be "E. H. H.", written over a horizontal line.

⁵ Art. II, sec. 7 provides, "A member can be removed by the Board of Ethics for reasons related to violations of the City Code, the City Charter, statute, and/or the Rules and Regulations of the Board of Ethics, or for missing excessive meetings. Removal of a member requires a vote of a majority plus one of the members. The subject of the removal effort must be recused from the vote. In the event that the requisite votes are recorded, the member is considered to be immediately removed, and may not participate in the business of the Board of Ethics. Notifications of the removal must be provided in writing, to the City Clerk, to the City Council, and to the removed member. In the writing to the City Council, the Board will ask the City Council to appoint a replacement member to the Board"